

1 Joshua H. Haffner, Esq. SBN 188652
2 jhh@haffnerlawyers.com
3 Alfredo Torrijos, Esq., SBN 222458
4 at@haffnerlawyers.com
5 Vahan Mikayelyan, Esq. SBN 337023
6 vh@haffnerlawyers.com
7 **HAFFNER LAW PC**
8 15260 Ventura Blvd., Suite 1520
9 Sherman Oaks, California 91403
10 Tel: (213) 514-5681
11 Fax: (213) 514-5682

12 Attorneys for Plaintiff

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 ESMERALDA BECERRA,
16 individually and as representative of a
17 class of participants and beneficiaries
18 and on behalf of the Bank of America
19 401K Plan,

20 Plaintiff,

21 v.

22 BANK OF AMERICA
23 CORPORATION; BANK OF
24 AMERICA CORPORATION
25 CORPORATE BENEFITS
26 COMMITTEE; and DOES 1-10,
27 inclusive

28 Defendants.

CASE NO.:

**CLASS ACTION COMPLAINT
FOR:**

- (1) **BREACH OF FIDUCIARY DUTY, 29 U.S.C. §1104(a)(1);**
- (2) **BREACH OF ERISA'S ANTI-INUREMENT PROVISION, 29 U.S.C. §1103(c)(1);**
- (3) **BREACH OF ERISA'S PROHIBITED TRANSACTIONS, 29 U.S.C. § 1106(a)(1) and (b)(1); AND**
- (4) **FAILURE TO MONITOR FIDUCIARIES.**

[DEMAND FOR TRIAL BY JURY]

1 Plaintiff Esmeralda Becerra, individually and as representative of a class of
2 participants and beneficiaries and on behalf of the Bank of America 401K Plan
3 (“Plaintiff”), alleges based upon information and belief as follows:

4 **NATURE OF ACTION**

5 1. This action arises out of Defendants Bank of America Corporation and
6 Bank of America Corporation Corporate Benefits Committee’s (“Defendants”),
7 wrongful use, for their own benefit, of assets in their employees’ 401k retirement
8 plan. As set forth herein, Defendants used forfeited plan assets to reduce its
9 employer contribution obligations, rather than for the benefit of plan participants, in
10 violation of the Employment Retirement Income Security Act (“ERISA”) and
11 Defendants’ fiduciary responsibilities. In this action, Plaintiff seeks damages in
12 connection with Defendants’ wrongful conduct in misusing forfeited Plan assets for
13 its own benefit.

14 **JURISDICTION AND VENUE**

15 2. This action is brought under 29 U.S.C. §§ 1132(a), (e), (f) and (g) as it
16 involves a claim by Plaintiff for employee benefits under an employee benefit plan
17 regulated and governed by ERISA. Subject matter jurisdiction is predicated under
18 these code sections as well as 28 U.S.C. § 1331 as this action involves a federal
19 question.

20 3. The Court has personal jurisdiction over Defendants because ERISA
21 provides for nationwide service of process, and each defendant has minimum
22 contacts with the United States. See 29 U.S.C. § 1132(e)(2).

23 4. The claims of Plaintiff and the putative class arise out of the Plan
24 issued, administered, and/or implemented in this District. Moreover, Plaintiffs
25 reside in this District. Thus, venue is proper in this judicial district pursuant to 29
26 U.S.C. §1132(e)(2) (setting forth special venue rules applicable to ERISA actions).

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PARTIES

5. Plaintiff Esmeralda Becerra is an individual who, during the relevant period, resided in Riverside, California. Plaintiff was at all relevant times participating in the 401k Plan at issue.

6. The Bank of America 401K Plan (the “Plan”) is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and § 1002(34) and is subject to the provisions of ERISA pursuant to 29 U.S.C. § 1003(a)

7. Plaintiff is informed and believes, and on that basis alleges, that Defendant Bank of America Corporation is authorized to conduct and is actually conducting business in the State of California, and is the sponsor and/or administrator of the Plan.

8. Plaintiff is informed and believes, and on that basis alleges, that Defendant Bank of America Corporation Corporate Benefits Committee is a committee that was created by Defendants to assist in the management of the Plan and/or Plan assets. Plaintiff is informed and believes, and on that basis alleges, that the Committee is the administrator of the Plan, and was delegated with the authority to direct the trustee with respect to crediting and distributing Plan assets.

9. Defendants Bank of America Corporation and Bank of America Corporation Corporate Benefits Committee will collectively be referred to as “Bank of America.”

10. Defendants each exercised discretionary authority and/or control over the management and/or distribution of the Plan, and are fiduciaries of the Plan, including pursuant to 29 U.S.C. §1002(21)(A)

11. Plaintiff is currently ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of the defendants sued herein under the fictitious names Does 1 through 10, inclusive, and therefore sue such defendants by such fictitious names. Plaintiffs will seek leave to amend this complaint to

1 allege the true names and capacities of said fictitiously named defendants when
2 their true names and capacities have been ascertained. Plaintiffs are informed and
3 believe and thereon alleges that each of the fictitiously named defendants is legally
4 responsible in some manner for the events and occurrences alleged herein, and for
5 the damages suffered by the Class.

6 12. Plaintiff is informed and believes and thereon alleges that all
7 defendants, including the fictitious Doe defendants, were at all relevant times acting
8 as actual agents, conspirators, ostensible agents, alter egos, partners and/or joint
9 venturers and/or employees of all other defendants, and that all acts alleged herein
10 occurred within the course and scope of said agency, employment, partnership, and
11 joint venture, conspiracy or enterprise, and with the express and/or implied
12 permission, knowledge, consent authorization and ratification of their co-
13 defendants; however, each of these allegations are deemed “alternative” theories
14 whenever not doing so would result in a contradiction with other allegations.

15 **FACTUAL ALLEGATIONS**

16 13. The assets of the Plan are held in a trust fund pursuant to 29 U.S.C.
17 §1103(a).

18 14. The Plan is funded by a combination of employee/participant
19 contributions (usually paid through wage withholdings) and employer
20 contributions, which are deposited into the Plan’s trust fund. Once deposited into
21 the Plan’s trust fund, all employee/participant and employer contributions become
22 assets of the Plan.

23 15. Participants in the Plan immediately vest in their own contributions,
24 and earnings on their contributions. Plaintiff is informed and believes, and on that
25 basis alleges, that participants vest in the employer contributions after 3 years of
26 service.

1 16. Participants who have a break in service prior to full vesting of
2 employer contributions, forfeit the balance of unvested employer contributions, and
3 Defendants exercise control over how these Plan assets are thereafter allocated.

4 17. Plaintiff is informed and believes, and on that basis alleges, that as part
5 of a wrongful pattern and practice, Defendants have wrongfully and consistently
6 used forfeited nonvested plan assets for its own benefit, to reduce future employer
7 contributions, rather than for the benefit of Plan participants. Plaintiff is informed
8 and believes, and on that basis alleges, that Defendants have used millions of
9 dollars in forfeited Plan assets to offset employer contributions. Defendant's use of
10 Plan forfeited assets to offset its employer contributions violates ERISA statutes,
11 including but not limited to, 29 U.S.C. §§1103(c)(1), 1104(a)(1), and 1106.

12 18. Defendants' allocation of forfeited fund assets to reduce its own
13 employer contributions benefitted Defendants, but harmed the Plan and participants
14 in the Plan, including by reducing Plan assets, and not allocating forfeited funds to
15 participants' accounts, and/or for the benefit of participants.

16 19. By choosing to use forfeited Plan assets to benefit itself and not the
17 Plan or the Plan's participants, Defendants have placed its own interests above the
18 interests of the Plan and its participants

19 **CLASS ACTION ALLEGATIONS**

20 20. Plaintiff bring this action on behalf of herself and all others similarly
21 situated as a Class Action pursuant to Federal Rules of Civil Procedure Rule 23.
22 Pursuant to Rule 23(b)(1) and (b)(2), Plaintiffs seek certification of a class defined
23 as follows:

24 All participants and beneficiaries of Bank of America 401K Plan, who
25 participated in the plan at anytime within the longest statute of
26 limitations for each claim pled, excluding Defendants and members of
27 the Committees.
28

1 21. Plaintiffs and the Class reserve the right under Federal Rule of Civil
2 Procedure Rule 23(c)(1)(C) to amend or modify the class to include greater
3 specificity, by further division into subclasses, or by limitation to particular issues.

4 22. This action has been brought and may be properly maintained as a
5 class action under the provisions of Federal Rules of Civil Procedure Rule 23
6 because there is a well-defined community of interest in the litigation and the
7 proposed class is easily ascertainable.

8 **A. Numerosity**

9 23. The potential members of the proposed class as defined are so
10 numerous that joinder of all the members of the proposed class is impracticable.
11 While the precise number of proposed class members has not been determined at
12 this time, Plaintiff is informed and believes that there are a substantial number of
13 participants and beneficiaries Plan who have been similarly affected.

14 **B. Commonality**

15 24. Common questions of law and fact exist as to all members of the
16 proposed class.

17 **C. Typicality**

18 25. The claims of the named Plaintiff is typical of the claims of the
19 proposed class. Plaintiff and all members of the class are similarly affected by
20 Defendants' wrongful conduct.

21 **D. Adequacy of representation**

22 26. Plaintiff will fairly and adequately represent and protect the interests of
23 the members of the proposed class. Counsel who represent Plaintiff are competent
24 and experienced in litigating large and complex class actions.

25 **E. Superiority of class action**

26 27. A class action is superior to all other available means for the fair and
27 efficient adjudication of this controversy. Individual joinder of all members of the
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1 proposed Class is not practicable, and common questions of law and fact exist as to
2 all class members.

3 28. Class action treatment will allow those similarly situated persons to
4 litigate their claims in the manner that is most efficient and economical for the
5 parties and the judicial system. Plaintiff is unaware of any difficulties that are likely
6 to be encountered in the management of this action that would preclude its
7 maintenance as a class action.

8 **F. Rule 23(b) requirements**

9 29. Inconsistent or varying adjudications with respect to individual
10 members of the class would establish incompatible standards of conduct.

11 30. Adjudications with respect to individual class members would be
12 dispositive of the interests of the other members not parties to the individual
13 adjudications or would substantially impair or impede their ability to protect their
14 interests.

15 31. Defendants have acted or refused to act on grounds generally
16 applicable to the class, thereby making appropriate final injunctive relief or
17 corresponding declaratory relief with respect to the class as a whole.

18 **FIRST CLAIM FOR RELIEF**

19 **BREACH OF FIDUCIARY DUTY**

20 **29 U.S.C. § 1104(a)(1)**

21 32. Plaintiff re-alleges and incorporates by reference the allegations
22 contained in the preceding paragraphs of this complaint, as though fully set forth
23 herein.

24 33. Under 29 U.S.C. § 1104(a)(1)(A), Defendants were required to
25 discharge their duties owed to the Plan “solely in the interest of the participants and
26 beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to
27 participants and their beneficiaries, and (ii) defraying reasonable expenses of
28 administering the plan.”

1 34. Defendants breached their fiduciary duty under 29 U.S.C. §
2 1104(a)(1)(A) by utilizing forfeited Plan assets for its benefit, rather than the
3 benefit of Plan participants. Defendants have chosen to apply forfeited Plan assets
4 to decrease future employer contributions, instead of using those funds for the
5 benefit of Plan participants. In doing so, Defendants placed their interests above
6 the interests of Plan participants and beneficiaries.

7 35. Pursuant to 29 U.S.C. § 1104(a)(1)(B), Defendants were required to
8 discharge their duties with respect to the Plan “with the care, skill, prudence, and
9 diligence under the circumstances then prevailing that a prudent man acting in a
10 like capacity and familiar with such matters would use in the conduct of an
11 enterprise of a like character and with like aims.”

12 36. Defendants breached their duty of prudence under 29 U.S.C. §
13 1104(a)(1)(B) by declining to use the forfeited funds in the plan for the benefit of
14 Plan participants, and instead using such Plan assets to reduce the Company’s own
15 contributions to the Plan. Defendants failed to engage in a reasoned and impartial
16 decision making process in deciding to use the forfeited funds in the Plan to reduce
17 the Company’s own contribution expenses. Defendants failed to act in a prudent
18 manner, in the best interest of the Plan’s participants, and failed to consider whether
19 participants would be better served by another use of these Plan assets after
20 considering all relevant factors.

21 37. Defendant’s have a fiduciary duty to comply with ERISA statutes. 29
22 U.S.C. § 1104(a)(1)(D). Defendants breached their fiduciary duty by using
23 forfeited Plan assets in violation of ERISA statutes, as alleged herein.

24 38. Defendants’ wrongful conduct, as alleged herein, caused the Plan to
25 receive fewer future employer contributions than it would otherwise received, and
26 depleted Plan assets.

1 39. As a direct and proximate cause of Defendants' fiduciary breaches, the
2 Plan suffered injury and losses and, pursuant to 29 U.S.C. § 1109, Defendants' are
3 liable for such losses.

4 40. Each Defendant knowingly participated in the breach of the other
5 Defendants, knowing that such acts were a breach, enabled other Defendants to
6 commit a breach by failing to lawfully discharge its own fiduciary duties, knew of
7 the breach by the other Defendants and failed to make any reasonable effort under
8 the circumstances to remedy the breach. Thus, each Defendant is liable for the
9 losses under 29 U.S.C. § 1105(a).

10 **SECOND CLAIM FOR RELIEF**

11 **BREACH OF ERISA'S ANTI-INUREMENT PROVISION**

12 **29 U.S.C. §1103(c)(1)**

13 41. Plaintiff re-alleges and incorporates by reference the allegations
14 contained in the preceding paragraphs of this complaint, as though fully set forth
15 herein.

16 42. Pursuant to 29 U.S.C. § 1103(c)(1), "the assets of a plan shall never
17 inure to the benefit of any employer and shall be held for the exclusive purpose of
18 providing benefits to participants in the plan and their beneficiaries and defraying
19 reasonable expenses of administering the plan."

20 43. The funds in a participant's accounts that are forfeited when a break in
21 service occurs prior to full vesting are assets of the Plan.

22 44. By using Plan assets for its own benefit, to reduce its own future
23 employer contributions to the Plan, thereby saving itself millions of dollars in
24 contribution costs, Defendants caused the assets of the Plan to inure to the benefit
25 of the employer in violation of 29 U.S.C. § 1103(c)(1).

26 45. Pursuant to 29 U.S.C. § 1109(a), Defendants are liable for the Plan
27 losses resulting from violation of ERISA's anti inurement provision as alleged in
28

1 this claim, and must restore to the Plan all profits secured through their use of Plan
 2 assets, and is subject to other equitable or remedial relief as appropriate

3 **THIRD CLAIM FOR RELIEF**

4 **BREACH OF ERISA'S PROHIBITED TRANSACTIONS**

5 **29 U.S.C. § 1106**

6 46. Plaintiff re-alleges and incorporates herein by reference the allegations
 7 contained in the preceding paragraphs of this complaint, as though fully set forth
 8 herein.

9 47. 29 U.S.C. § 1106(a)(1) provides that “[a] fiduciary with respect to a
 10 plan shall not cause the plan to engage in a transaction, if he knows or should know
 11 that such transaction constitutes a direct or indirect . . . exchange . . . of any
 12 property between the plan and a party in interest . . . or use by or for the benefit of a
 13 party in interest, of any assets of the plan.” Defendants are parties in interest, as
 14 that term is defined under 29 U.S.C. §1002 (14), because they are Plan fiduciaries
 15 and because Defendant Bank of America is the employer of Plan participants.

16 48. 29 U.S.C. § 1106(b) provides that “[a] fiduciary with respect to a plan
 17 shall not,” among other things, “deal with the assets of the plan in his own interest
 18 or for his own account.”

19 49. Defendants violated these prohibitions by utilizing these Plan assets as
 20 a substitute for future employer contributions to the Plan, thereby saving themselves
 21 millions of dollars in contribution expenses. As alleged herein, Defendants caused
 22 the Plan to engage in transactions that constituted a direct or indirect exchange of
 23 existing Plan assets for future employer contributions and/or a use of Plan assets by
 24 or for the benefit of a party in interest, and Defendants dealt with the assets of the
 25 Plan in their own interest and for their own account.

26 50. As a result of these prohibited transactions, Defendants caused the Plan
 27 to suffer losses in the amount of the Plan assets that were substituted for future
 28 employer contributions and the lost investment returns on those assets.

1 51. Pursuant to 29 U.S.C. § 1109(a), Defendants are liable for the Plan
2 losses resulting from violation of ERISA's prohibition on these transactions, as
3 alleged in this claim, and must restore to the Plan all profits secured through their
4 use of Plan assets, and is subject to other equitable or remedial relief as appropriate.

5 **FOURTH CLAIM FOR RELIEF**

6 **FAILURE TO MONITOR FIDUCIARIES**

7 52. Plaintiff re-alleges and incorporates herein by reference the allegations
8 contained in the preceding paragraphs of this complaint, as though fully set forth
9 herein.

10 53. Defendant Bank of America Corporation oversaw the overall
11 governance of the Plan and had authority to delegate fiduciary responsibilities.
12 Defendant Bank of America Corporation created the Committee to assist in Plan
13 management and delegated to the Committee the authority to direct the trustee with
14 respect to crediting and distribution of Plan assets.

15 54. Defendant Bank of America Corporation had a duty to monitor the
16 person(s) to whom it delegated fiduciary responsibilities, and to take prompt action
17 to protect the plan and correct any breaches of fiduciary duty or violation of ERISA
18 statutes.

19 55. Defendant Bank of America Corporation breached its duty to monitor
20 the fiduciaries to whom it delegated responsibility for Plan management by, among
21 other things, unreasonably failing to monitor the Committee's management and use
22 of forfeited funds, failing to take steps to ensure that its fiduciary duties and ERISA
23 statutes were properly complied with respect to Plan assets, and permitting
24 Defendants to continuously use forfeited funds for the benefit of the employer,
25 rather than Plan participants, as alleged herein.

26 56. As a direct and proximate cause of Defendant's breach of its duty to
27 monitor fiduciaries, the Plan suffered losses, as alleged herein.

28

REQUEST FOR RELIEF

Wherefore, Plaintiff, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, prays for judgment against Defendants as follows:

1. That Defendants have breached their fiduciary duties and engaged in prohibited conduct and transactions as described above;

2. That Defendants are personally liable to make good to the Plan all losses to the Plan resulting from each violation of ERISA described above, and to otherwise restore the Plan to the position it would have occupied but for these violations;

3. That all assets and profits secured by Defendants as a result of each violation of ERISA described above are to disgorged;

4. For an accounting to determine the amounts Defendants must make good to the Plan under 29 U.S.C. § 1109(a);

5. Removal of the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;

6. Surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;

7. Certify the case as a class action;

8. Award attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) and the common fund doctrine;

9. Award class representatives a service award.

10. Order the payment of interest to the extent it is allowed by law; and

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1 11. Grant other equitable or remedial relief as the Court deems
2 appropriate.

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4 DATED: August 9, 2024

HAFFNER LAW PC

5
6 By: /s/ Joshua H. Haffner
7 Joshua H. Haffner
8 Alfredo Torrijos
9 Vahan Mikayelyan
Attorneys for Plaintiff and all
Others similarly situated

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

DATED: August 9, 2024

HAFFNER LAW PC

By: /s/ Joshua H. Haffner
Joshua H. Haffner
Alfredo Torrijos
Vahan Mikayelyan
Attorneys for Plaintiff